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Essay

PARTY POLARIZATION AND JUDICIAL REVIEW: LESSONS FROM THE AFFORDABLE CARE ACT[†]

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ABSTRACT—Congress paid nearly no attention to the Constitution when enacting the Affordable Care Act (ACA) in 2010. Legislative hearings and committee reports ignored the Constitution altogether; legislative debates largely did the same. This Essay both highlights Congress’s indifference to the Constitution when enacting the ACA and examines the reasons behind this legislative failure. In particular, this Essay advances three explanations. First, Congress is generally uninterested in “public goods” like constitutional interpretation. Second, the polarization of Democrats and Republicans in Congress further depresses Congress’s interest in thinking about the Constitution; instead, the majority party seeks to limit opportunities for the minority party to raise constitutional objections to legislation. Third, there is no federalism constituency in Congress that pushes lawmakers to take federalism into account when enacting legislation. For this very reason, Republican lawmakers almost always attacked the ACA on policy, rather than on constitutional, grounds. While embracing these three explanations, this Essay rejects a fourth explanation, namely, that lawmakers had no reason to know that the ACA would be subject to vigorous constitutional attack. Finally, this Essay argues that congressional disinterest in constitutional federalism supports the Supreme Court’s establishment of boundaries that limit Congress’s Commerce Clause power. At the same time, this Essay does not endorse the action–inaction distinction advanced by five Justices in the ACA decision.

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INTRODUCTION

When enacting the Patient Protection and Affordable Care Act (ACA),¹ the 111th Congress paid scant attention to possible constitutional challenges to their signature achievement. No constitutional hearings were held, committee reports did not discuss the Act's constitutionality, and legislative debates largely ignored constitutional objections to the Act.² Why did lawmakers seemingly drop this ball?

In the lead-up to *National Federation of Independent Business v. Sebelius* (*NFIB*),³ various theories were launched and various culprits identified. Writing in the *Wall Street Journal*, Michael McConnell argued that "[t]he drafters and defenders of the health-care law have only themselves to blame for this mess . . . [as] they did not take seriously their

¹ Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified as amended in scattered sections of 42 U.S.C.).

² For a somewhat competing account, see Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367 (2011). Professor Zietlow, looking at statements made on the floor of Congress about the constitutionality of the ACA, suggests that Congress did take the Constitution into account when enacting the ACA. *See id.* at 1395–1401. Professor Zietlow, however, does not examine the legislative process leading up to that floor debate. For reasons discussed in Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737 (2011), statements made in the *Congressional Record* are an inadequate measure of Congress's interest in the Constitution. *See id.* at 766–68. More than that, although Professor Zietlow does an excellent job showcasing the number of lawmakers who spoke about the constitutionality of the ACA, I nonetheless argue in this Essay that lawmakers were not particularly interested in constitutional questions when debating the ACA.

³ 132 S. Ct. 2566 (2012).

obligation to” interpret the Constitution and act within its bounds.⁴ In a vigorous defense of congressional Democrats that appeared in *Salon*, Andrew Koppelman claimed that the bill’s supposed constitutional shortcomings “could not have been anticipated *because they did not exist while the bill was being written.*”⁵ In both *The New Yorker* and *The New York Times*, news analyses placed responsibility on a confluence of factors—the fact that “liberal [legal] academics” thought the constitutional issue a nonstarter, the failure of the Republican lawmakers and media outlets to question the bill’s constitutionality, and the related failure of media outlets to run stories about potential legal challenges to the statute.⁶

In earlier writings that have appeared in the *Northwestern University Law Review* and *Northwestern University Law Review Colloquy*,⁷ I have argued that party polarization contributes to congressional disinterest in the Constitution and that the ACA is a classic case study of the pernicious effects of polarization on congressional interest in constitutional questions. In the pages that follow, I will recap and extend that argument. Specifically, after discussing party polarization’s impact on constitutional deliberations and the corresponding failure of Congress to take the Constitution seriously when enacting the ACA, I will consider alternative explanations for Congress’s failure to take the Constitution into account when enacting the legislation. I will embrace two supplemental explanations—Congress’s general disinterest in “public goods” like constitutional interpretation and the absence of a federalism constituency in Congress.⁸ I will also examine and call into question a third supplemental explanation, namely, that Congress lacked the time to take the Constitution into account. I will argue instead that Congress was on notice of potential constitutional challenges to the bill, but that there was insufficient popular or interest group pressure to galvanize otherwise uninterested lawmakers into action.

Following this assessment, I will close this Essay by shifting from the positive to the normative. In particular, I will consider the sensibility of the

⁴ Michael W. McConnell, Op-Ed., *The Liberal Legal Meltdown over ObamaCare*, WALL ST. J., May 25, 2012, at A13.

⁵ Andrew Koppelman, *Origins of a Healthcare Lie*, SALON (May 31, 2012, 12:38 PM), http://www.salon.com/2012/05/31/origins_of_a_healthcare_lie/.

⁶ Peter Baker, *Supporters Slow to Grasp Health Law’s Legal Risks*, N.Y. TIMES, June 24, 2012, at 1 (late edition); see Ezra Klein, *Unpopular Mandate*, NEW YORKER (June 25, 2012), http://www.newyorker.com/reporting/2012/06/25/120625fa_fact_klein.

⁷ Devins, *supra* note 2; Neal Devins, *Why Congress Did Not Think About the Constitution When Enacting the Affordable Care Act*, 106 NW. U. L. REV. COLLOQUY 261 (2012).

⁸ The public good argument (which I shall embrace and expand upon) is advanced by Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001). For scholarship discussing Congress’s tendency to undervalue federalism (and the related absence of a federalism constituency), see Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131 (2004), and John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004).

Supreme Court's policing of Congress's exercise of its Commerce Clause power.⁹ In *NFIB*, for example, the Court ruled that Congress cannot compel individuals to participate in the health care or any other market. In assessing the appropriateness of the Court constraining Congress in this way, I will argue that, similarly, Congress cannot be expected to self-police itself on federalism and that as a consequence, it is up to the Court to establish boundaries on federalism-related matters.¹⁰

I. PARTY POLARIZATION AND THE ACA

In this Part, I will make two points about party polarization. First, party polarization contributes to declining congressional interest in constitutional questions. Second, its existence helps explain Congress's failure to think about the Constitution when enacting the ACA. In making the first point, I will focus on congressional committee consideration of constitutional questions. In extending the polarization point to the ACA, I will consider hearings, committee reports, and legislative debates.

A. *Party Polarization and Congressional Committee Consideration of Constitutional Questions*

Congressional hearings and, more generally, the work of congressional committees provide an important lens for understanding lawmaker interest in constitutional questions.¹¹ Congressional committees, along with political parties, are one of the two "principal organizing structures of Congress."¹² Hearings, moreover, are a relatively accessible source of information about Congress. Unlike informal contacts among staffers, members, lobbyists, and agency officials, hearings are public events.

With respect to constitutional questions, congressional practices changed dramatically between 1970 and 2010.¹³ Although committees routinely considered constitutional questions for the first twenty years of that period, starting around 1990—and especially following the 1995 Republican takeover of Congress—there was a notable decline in the

⁹ *NFIB* also imposed limits on Congress's spending power, holding that the conditioning of *all* federal Medicaid dollars on state participation in the ACA's Medicaid expansion program was unduly coercive and therefore unconstitutional. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). Because the focus of my ACA case study is on the Commerce Clause, I will provide only limited discussion of the Spending Clause issue.

¹⁰ At the same time, I will express my personal disapproval of the Court's embrace of the action-inaction distinction in *NFIB*.

¹¹ See Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, in *CONGRESS AND THE CONSTITUTION* 87, 87–88 (Neal Devins & Keith E. Whittington eds., 2005).

¹² John H. Aldrich & David W. Rohde, *Congressional Committees in a Continuing Partisan Era*, in *CONGRESS RECONSIDERED* 217, 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009).

¹³ See Devins, *supra* note 2, at 741–53, for a detailed presentation of the data summarized in this paragraph.

number of constitutional hearings. Indeed, while there were more than sixty constitutional hearings each year for most years between 1970 and 1985, there were fewer than forty constitutional hearings most years between 1995 and 2010.¹⁴ During that same period, moreover, the House and Senate Judiciary Committees became the only committees to regularly conduct constitutional hearings. This meant that the Judiciary Committees held 72% of constitutional hearings between 1995 and 2010, compared to 46% during the 1970s.¹⁵

In making sense of these two trends, I think it is sensible to pay attention to the most obvious and recognizable development in Congress over the past forty years—the ever-growing polarization between the Democratic and Republican parties.¹⁶ The Congress that enacted the ACA was much different than the Congress of 1970. In 1970, with a strong contingent of conservative Southern Democrats, Democrats occupied every ideological niche. Likewise, there were several liberal “Rockefeller Republicans.” Indeed, throughout the 1970s, there was no meaningful gap in the median liberal–conservative scores of the two parties. George Wallace thus justified his 1968 run for president by arguing that there was not “a dime’s worth of difference” between the two parties.¹⁷

Today, however, the forces that pushed Democrats and Republicans toward the center have given way to an era of ideological polarization. After Ronald Reagan’s presidential victory in 1980, the moderate-to-liberal wing of the Republican Party began to disappear. “Ronald Reagan’s GOP” pursued a conservative agenda that simultaneously isolated the liberal wing of the Republican Party and appealed to right-leaning Southern Democrats, many of whom switched allegiance to the increasingly conservative Republican Party. Computer-driven redistricting further exacerbated emerging polarization by drawing district lines that essentially guaranteed each party would win particular seats in the House of Representatives. As a result, Democratic and Republican candidates sought to mobilize the more

¹⁴ From 1985 to 1990, there was no overall decline. The sustained decline (reflecting growing polarization in Congress) began around 1990. *See id.* at 743 fig.1.

¹⁵ *Id.* at 750. From 1980 to 1994, Judiciary Committees held 56% of all constitutional hearings. Specifically, from 1985 to 1992, the Judiciary Committees held less than 50% of constitutional hearings, and the spike associated with the modern era began around 1992 (again reflecting growing polarization in Congress). *See id.*

¹⁶ For an excellent treatment of party polarization in Congress since the early 1970s, see generally SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* (2008). In linking party polarization to changes in congressional constitutional hearing practices, I do not mean to suggest that party polarization is the only salient variable in the number and location of hearings. As I explain in Devins, *supra* note 2, at 768–75, changes in the national policy agenda, changes in party leadership, court decisionmaking, and presidential action all impact congressional practices—so there is year-to-year variability in congressional practices. At the same time, party polarization explains the general decline in constitutional hearings and the related rise of the Judiciary Committees as the only committees to regularly hold constitutional hearings.

¹⁷ Richard Pearson, *Ex-Gov. George C. Wallace Dies at 79*, WASH. POST, Sept. 14, 1998, at A1.

partisan bases that vote in party primaries, which pushed out moderates and rewarded candidates who were both more ideological and more loyal to their party. By 1990, Congress was transformed; a sharp, ever-growing divide between the parties replaced the equally sharp gap between Northern and Southern members of each party. This divide grew throughout the 1990s and 2000s. By 2009—and continuing through today—the ideological distance between the two parties was greater than at any time since Reconstruction.¹⁸

Party polarization, moreover, has resulted in a basic shift of power away from congressional committees and toward party leaders. “As the views of members within [each] party become more alike, the costs of delegating agenda power” to leadership diminishes.¹⁹ Leadership, for example, exercises greater control over the agenda and jurisdiction of committees. Leadership has also slashed committee staff and engaged in other reforms that have diminished committee influence.²⁰ Leadership has also strengthened its own hand by engaging in message politics—party efforts to use the legislative process to make symbolic statements to voters and other constituents.²¹

The interface of these factors largely explains the decline in constitutional hearings.²² With fewer staff resources and increasing intraparty agreement, lawmakers (outside of the Judiciary Committees) are likely to focus on policy issues that reinforce their party’s message and shy away from constitutional questions that cast doubt on the legality of their handiwork. More generally, lawmakers now have incentives to discount constitutional interpretation in favor of other pursuits—reelection, advancement within the party, and constituent service. By way of contrast, Congress was more apt to hold constitutional hearings in the less polarized 1960s and 1970s. There was less pressure to pursue a party-defined message, and substantially bigger staffs gave committees the resources to consider a broader range of issues in hearings. Furthermore, committee

¹⁸ Party polarization refers to the ideological distance between the average Democratic and Republican lawmakers based on roll call voting in the House and Senate. In calculating party averages, roll call votes are registered as liberal, conservative, or moderate. See *Party Polarization: 1879–2010*, POLARIZED AM. (Jan. 11, 2011), http://polarizedamerica.com/Polarized_America.htm#POLITICAL_POLARIZATION.

¹⁹ David W. Rohde et al., *Parties, Committees, and Pivots: A Reassessment of the Literature on Congressional Organization* 12 (Aug. 21, 2008) (unpublished manuscript) (on file with the Northwestern University Law Review). For additional discussion, see Devins, *supra* note 2, at 756–59.

²⁰ For an inventory of institutional reforms that have shifted power away from committees and to party leaders, see Devins, *supra* note 2, at 757–58.

²¹ See C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001).

²² The issues explored in this and the next paragraphs are drawn from Devins, *supra* note 2, at 759–68. See also *id.* at 768–75 (noting that notwithstanding the general decline in constitutional hearings, there are occasional spike-up years typically tied to presidential initiatives, court decisions, and changes in party control of Congress).

chairs needed to reach out to minority party members to form coalitions, recognizing the fact that some members of their own party disagreed with their policy priorities, creating a greater incentive to pursue hearings in a bipartisan way and resulting in committees that were more likely to consider the constitutional foundations of legislation.

To make these points more concrete, consider the relationship between the majority and minority parties in defining the content of congressional hearings. In today's polarized Congress, Democrats and Republicans vote along party lines, pursue different agendas, and seek to advance their own messages while undermining those of the opposing party. For this reason, the majority party is increasingly unwilling to allow opposition lawmakers to challenge the constitutionality of legislative proposals. While legislative majorities have always controlled the policies and agendas of committee hearings, party polarization has nevertheless resulted in further limiting minority access to hearings. In part, the majority party's increasing homogeneity squelches competing views and thus makes hearings more one-sided. Committee chairs can count on party loyalists to stick together, and consequently, there is less reason to reach out to majority or minority party members who do not necessarily agree with the chair's agenda. In all, with party leaders exercising greater control over the agenda and membership of committees, committee chairs have both less interest in and less freedom to pursue issues that are inconsistent with the interest of party leaders. Against this backdrop, policy and constitutional objections to committee initiatives will likely come from the minority party.²³ Yet the majority party may not allow committee hearings to serve as a vehicle for airing such minority party objections.²⁴

The Judiciary Committees, like other committees, are also polarized along party lines. Unlike other committees, however, the confluence of jurisdiction, member preferences, and interest group pressure has resulted in the Judiciary Committees' continuing to hold constitutional hearings.²⁵ Moreover, with the general decline in congressional consideration of constitutional questions, lawmakers increasingly look to the courts as the last word on constitutional questions.²⁶

²³ See J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 142–43 (2004).

²⁴ See Devins, *supra* note 2, at 766–67.

²⁵ Most importantly, the Judiciary Committees cannot treat constitutional issues as second order largely because they have jurisdiction over civil liberties, constitutional amendments, and federal courts (not to mention the Senate's power to confirm federal judges and Justice Department officials).

²⁶ Today's Congress—as Bruce Peabody found in his study of lawmaker attitudes toward Court–Congress relations—no longer thinks that the Court should defer to its constitutional judgments. See Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127, 127 (2004); see also Devins, *supra* note 2, at 763–64. For additional discussion, see *infra* note 72.

In summary, congressional committees increasingly use hearings to advance the partisan goals of the majority party.²⁷ With more intraparty agreement and fewer staff resources, committees generally focus on policy concerns and pay scant attention to the constitutional foundations of legislation. Correspondingly, the minority party is both more likely to raise constitutional objections to legislation and less likely to have access to these hearings. Outside of the Judiciary Committees, which continue to hold constitutional hearings, minority party members are most likely to express constitutional concerns through floor statements published in the *Congressional Record* and outreach efforts such as press releases and other public statements.

B. Congress, the Constitution, and the Affordable Care Act

For reasons I will now detail, the enactment of the ACA tracks general trends in Congress. Congress failed to take account of the Constitution when enacting the ACA. Indeed, the final version of the bill makes no reference to any of the constitutional provisions that potentially empowered Congress to enact the ACA—the Spending Clause, the Commerce Clause, the Necessary and Proper Clause, or Congress’s taxing power.²⁸ Democratic leaders did not refer the bill to the Judiciary Committees, and constitutional issues were not explored in any committee hearings or reports. Constitutional issues received limited attention in legislative debates, with some Republican members raising constitutional objections (and some Democrats responding to those objections). Party polarization may well have figured into this legislative failure.

To start, the 111th Congress held forty-four hearings about the ACA between its January 2009 opening and March 2010 enactment of the ACA. Lawmakers, however, did not hold any hearings to examine the bill’s constitutionality. Also, although Congress specifically found that the ACA’s individual mandate “is commercial and economic in nature, and substantially affects interstate commerce,”²⁹ it did not consider the linkage

²⁷ For discussions of majority party control of hearings (including the tendency of the majority party to call witnesses to support predefined party messages), see Devins, *supra* note 2, at 766–67; see also Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne’s Testimony*, 54 DUKE L.J. 1525, 1542–50 (2005).

²⁸ The statute does include findings that the ACA in general and the individual mandate in particular “affect[] interstate commerce.” Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242 (2010) (to be codified at 42 U.S.C. § 18091). And while (as Chief Justice Roberts noted in his opinion upholding the individual mandate) “the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise,” it is nonetheless telling that Congress failed to reference the sources of constitutional authority that backed up the statute. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)) (internal quotation mark omitted). For further discussion, see *infra* note 106.

²⁹ § 1501, 124 Stat. at 242.

between the factual record it was assembling and applicable constitutional standards. Instead, lawmakers seemed largely indifferent to a potential constitutional challenge to the ACA. Given the political import of the ACA, the number of policy-related hearings held on the bill, and the advent of the Tea Party (whose questioning of the ACA's constitutionality proved politically salient to the Republican Party),³⁰ the fact that the Constitution played no meaningful role in congressional committee consideration of the ACA is striking.

Party polarization figures significantly in this story. First, for reasons just discussed, party polarization has led to a diminution in congressional interest in the Constitution. Second, with Republican lawmakers uniformly opposed to the bill, majority lawmakers worked hard to keep their coalition together. To accomplish this feat, Democratic leaders focused on policy priorities; hearings about whether the bill was constitutional likely would have hurt, not helped, their cause. Specifically, Democratic lawmakers could not risk any defections among their rank and consequently had nothing to gain by having bill opponents cast doubt on the constitutional bona fides of the bill. Correspondingly, recognizing the political costs of raising taxes, Democratic lawmakers (and the Obama White House) “absolutely reject[ed]” efforts to characterize the individual mandate as a tax.³¹

The battle over the ACA was fiercely partisan.³² No Republican voted for the final bill in either the House or Senate. As a result, Senate Majority Leader Harry Reid (D-Nev.) needed to craft a proposal that would be acceptable to all sixty Senate Democrats so that the Democratic majority could invoke cloture and break Republican efforts to derail the bill through a filibuster.³³ On the House side, Majority Leader Nancy Pelosi (D-Cal.) needed to secure the votes of 218 out of 258 House Democrats. Facing

³⁰ For a discussion of the Tea Party and its attacks on the ACA, see sources cited *infra* note 90; see also Zietlow, *supra* note 2, at 1395–1401.

³¹ Robert Pear, *Changing Stance, Administration Now Defends Insurance Mandate as a Tax*, N.Y. TIMES, July 18, 2010, at A14 (quoting President Obama).

³² For two excellent overviews of the legislative process tied to the enactment of the ACA, see *Health Care Overhaul Makes History for Obama, Democratic Congress*, in 2010 CQ ALMANAC 9–3–9–5 (Jan Austin ed., 66th ed. 2011), available at <http://library.cqpress.com/cqalmanac/document.php?id=cqal10-1278-70363-2371661>, and *Landmark Health Care Overhaul: A Long, Acrimonious Journey*, in 2009 CQ ALMANAC 13–3–13–14 (Jan Austin ed., 65th ed. 2010) [hereinafter *Landmark Health Care Overhaul*], available at <http://library.cqpress.com/cqalmanac/cqal09-1183-59550-2251513>. All factual claims in this and the next two paragraphs are supported by these two articles.

³³ Indeed, with the election of Republican Scott Brown to fill Edward Kennedy's Senate seat after Kennedy's August 2009 death, Senate Democrats needed to enact the bill before Brown took office so that Democratic holdover appointment Paul Kirk could vote on the bill. As a result, Reid kept the Senate in session for twenty-five consecutive days, with the final vote on the bill occurring on Christmas Eve 2009. Equally striking, to keep Nebraska Democrat Ben Nelson in the fold, moreover, Reid needed to amend the bill so that Nebraska would not have to contribute any state funds to the ACA's Medicaid expansion. See *infra* note 86.

some resistance from moderates within the party, Pelosi made compromises, including an agreement to allow pro-life Democrats and Republicans to vote on an amendment prohibiting the use of federal funds for abortion services except in cases of rape, incest, and danger to the woman's life.

The fact that Reid and Pelosi made such compromises to hold their base together does not cut against earlier claims about the conformity of views within each party. While increasing homogeneity within each party is a hallmark of party polarization, party polarization does not foreclose some ideological variation within a party. Instead, party polarization speaks to the general conformity of opinion within each party, the growing ideological distance between the two parties, and the likelihood that party members will vote with their leadership and against the other party. No Republican voted in favor of the ACA; in fact, the party launched a nationwide campaign against what they derogatively called "Obamacare." Democrats, on the other hand, overwhelmingly supported the measure and backed party leaders. Indeed, in the Senate, where all Democrats were needed to resist a Republican filibuster effort, the party voted as a unified block.

The diminished status of congressional committees in the enactment of the ACA also supports earlier claims about the linkage between party polarization and the ascendancy of party leaders at the expense of committee chairs. Pelosi deployed three House committees to work on the bill: Energy and Commerce, Education and Labor, and Ways and Means. In the Senate, Reid turned to the Finance Committee and the Health, Education, Labor, and Pensions Committee. Reid and Pelosi then "assembled their bills from the measures reported by their respective committees, selecting from among conflicting provisions and tweaking them again and again to corral voters."³⁴ With respect to constitutional issues, it is telling that neither the House nor Senate Judiciary Committees played any formal role. Instead, policy-oriented committees—most notably, committees with jurisdiction over health and finance—pursued the bill.

To make the connections between my earlier discussion of polarization and the ACA case study more explicit, I will now turn to the hearings, committee reports, and legislative debates that culminated in the enactment of the bill. As I will show, congressional committees paid virtually no

³⁴ *Landmark Health Care Overhaul*, *supra* note 32. No doubt, party leaders in less polarized Congresses have also tweaked legislation in order to cobble together a majority. At the same time, the fact that neither Reid nor Pelosi could reach out to Republican members is a hallmark of party polarization. When Congress enacted the 1964 Civil Rights Act, for example, Democratic leadership worked together with Republican leadership, knowing that Southern Democrats stood together to block the legislation. See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972*, at 132–49 (1990). Likewise, congressional committees were more likely to consider the factual suppositions of legislation when Congress was less polarized, including the question of whether Congress's commerce power supported the enactment of legislation. See *id.* at 87–95.

attention to constitutional questions in hearings or committee reports. While there were occasional comments about the Constitution in legislative debates, these comments highlight the fact that minority members were not allowed to air constitutional grievances in the committee process. In other words, the ACA case study backs up the claim that party polarization contributes to Congress's declining interest in the Constitution. Republican lawmakers' unified opposition to the ACA highlights polarization in Congress and explains why majority leadership needed to resist all efforts to derail the bill, including the need to limit opportunities for minority lawmakers to challenge the bill on constitutional grounds.

Twenty-two hearings tied to health care legislation were held in each chamber of Congress between January 20, 2009, and March 25, 2010, though none meaningfully considered the constitutionality of the ACA.³⁵ On the Senate side, the constitutionality of the statute was raised in only one hearing.³⁶ In that hearing, held in May 2009 by the Senate Finance Committee, Senator Orrin Hatch (R-Utah) asked witness James Klein, President of the American Benefits Council, whether geographic variations in tax rates based on state of residence would be constitutional. Klein said that he did not know, but another witness—Edward Kleinbard, Chief of Staff of the Joint Committee on Taxation—said that he thought Congress could constitutionally permit regional variations in tax rates.³⁷ Kleinbard's constitutional analysis was not part of a prepared statement and takes up nine sentences in the hearing record.

House hearings tell an identical tale. No witness testimony focused on constitutional questions, and only one witness answered a member question about the constitutionality of the ACA. In a September 2009 hearing before a subcommittee of the House Committee on Oversight and Government Reform, Representative Dennis Kucinich (D-Ohio) asked Michael Cannon, Director of Health Policy at the Cato Institute, whether the Constitution's

³⁵ My research assistant Brian Kelley prepared a memo listing each of these hearings, including an analysis of Congress's pursuit of constitutional issues in these hearings. His findings are summarized in Memorandum from Brian Kelley, Research Assistant, to author 22–29 (Aug. 4, 2011) (on file with the Northwestern University Law Review).

³⁶ *Roundtable Discussions on Comprehensive Health Care Reform: Hearings Before the S. Comm. on Fin.*, 111th Cong. (2009) [hereinafter *Roundtable Discussions*]. Outside of hearings on health care legislation, the only other reference in Senate hearings to the constitutionality of the ACA was a questionnaire submitted by Senator Tom Coburn (R-Okla.) to Health and Human Services nominee Kathleen Sebelius on whether Congress had constitutional authority to enact the individual mandate. In her written response, Sebelius expressed support for the bill without addressing the constitutional question. See *Nomination of Governor Kathleen Sebelius: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 111th Cong. 92 (2009).

³⁷ *Roundtable Discussions*, *supra* note 36, at 137 (statement of Edward Kleinbard, Chief of Staff, Joint Comm. on Taxation).

General Welfare Clause supported the enactment of the ACA. Cannon's equivocal response takes up just seven sentences in the hearing record.³⁸

That Congress did not explicitly consider the ACA's constitutionality is only part of the story. Lawmakers also did not use the hearings as a vehicle to meaningfully engage in fact-finding that would strengthen claims that (1) the ACA regulates economic activity pursuant to Congress's Commerce Clause power or (2) the ACA's Medicaid expansion was noncoercive.³⁹ Lawmakers likewise made no effort to link committee fact-finding to Supreme Court decisionmaking. Moreover, while the evidence is more ambiguous, there is very little evidence in the hearing record that suggests lawmakers were interested in establishing a factual predicate for the idea of a national health insurance marketplace in which all groups and individuals must participate. Lawmakers, instead, were concerned almost exclusively with the technical provisions of the bill and how those would affect health care going forward.

In examining congressional fact-finding, my research assistant Sam Mann and I looked at hearings in the 110th Congress (after Democrats took majority control of Congress in 2007 and held thirty hearings related to possible reforms of the health care system) and in the 111th Congress (from January 2009, when Obama took office, to March 2010, when Congress enacted the ACA).⁴⁰ As noted above, no hearing explicitly referenced constitutional standards or specifically sought to demonstrate that all individuals—whether or not they purchase health insurance—are part of the national health insurance marketplace.⁴¹ Eleven hearings did, however, address the national marketplace, and we focused our attention there. Of the

³⁸ *Between You and Your Doctor: The Bureaucracy of Private Health Insurance—Day 1: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 139–40 (2009) (statement of Michael F. Cannon, Director of Health Policy Studies, Cato Institute).

³⁹ On the question of whether the Act's Medicaid extension was noncoercive, a search of hearings and reports connected with Pub. L. No. 111-148 for [coer!] in ProQuest Congressional did not return any results relating to the ACA's Medicaid provisions being coercive; the only mentions of coercion had to do with coercion of seniors by caretakers and aggressive marketers for Private Fee for Service (PFFS) plans.

⁴⁰ Sixty individual hearings were examined. (The transcripts of some hearings were not available on any of the major databases.) In other words, while our research is fairly comprehensive, there may be some limitations resulting from data availability. The research is summarized in Memorandum from Sam Mann, Research Assistant, to author (Nov. 2011) (on file with the Northwestern University Law Review). All factual assertions in this paragraph are drawn from this memo.

⁴¹ One witness alluded to the Constitution when discussing the feasibility of a plan that included the individual mandate. Dr. James Mongan, in testimony discussing Massachusetts's experience with an individual mandate program, said the individual mandate was "tricky" business because "there are some on the right who attack it because they do not even want to mandate motorcycle helmets, let alone premium payments." *Charting a Course for Health Care Reform: Moving Toward Universal Coverage: Hearing Before the S. Comm. on Fin.*, 110th Cong. 30 (2007) (testimony of James J. Mongan, President and Chief Executive Officer, Partners HealthCare).

eleven, seven were held in the 110th Congress and four in the 111th Congress.

The overall focus of all of these hearings was the need for Congress to reform health care. On the questions surrounding the national marketplace for insurance, there was very little direct fact-finding. Lawmakers were primarily concerned with issues such as Medicare, expanding coverage, achieving the support of insurers, and eliminating waste in the system.⁴² In these eleven hearings that touched on the national marketplace, the committee members and witnesses often referred to subjects that could have proven relevant to constitutional litigation over the ACA—including expanding participation pools, the notion of voluntary markets, the need for universal care, and the economic benefits that a new nationwide system could provide.

There is some testimony regarding problems with the existing system of state regulation, such that establishing a national health insurance marketplace would benefit the health care system as a whole.⁴³ There is also testimony regarding the effect of decisions to opt out of the national market, usually made by the young and healthy, which leave the old and infirm still in the market with higher premiums.⁴⁴ However, there is no testimony regarding the connection between mandatory participation and a national market. In other words, there are only bits and pieces in these congressional hearings that address the need for a national health insurance marketplace in which the young and healthy cannot opt out. There is, however, no systematic effort to explore this question or, more generally, to consider whether those who opt out of health insurance nevertheless remain players in the national health care marketplace. Congress's failure to formally consider these matters—and, in so doing, shore up the ACA's constitutional

⁴² This is to be expected, given the power of the health insurers lobby and other economic interests impacted by the ACA. At the same time, Congress's failure to consider at all the Act's constitutional underpinnings is striking and highly suggestive of congressional disinterest in the Constitution. In particular, lawmakers could have asked witnesses to testify about the impact of the uninsured on the national health care marketplace. This testimony could have been useful to Department of Justice lawyers defending the statute. Moreover, there is no reason to think that calling such witnesses would come at a cost to majority lawmakers. Even if minority lawmakers questioned their analyses, these witnesses—so long as their fact-finding was methodologically sound—should have been able to respond to such questioning.

⁴³ See *America's Need for Health Reform: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 110th Cong. 34, 49 (2008) (statement of Stephen T. Parente, Director, Medical Industry Leadership Institute, and Associate Professor of Finance, Carlson School of Management).

⁴⁴ See *Health Care Reform: Recommendations to Improve Coordination of Federal and State Initiatives: Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions of the H. Comm. on Educ. & Labor*, 110th Cong. 46 (2007) (statement of Steven Goldman, Comm'r, New Jersey Department of Banking and Insurance); *Roundtable Discussions*, *supra* note 36, at 542 (statement of Scott Serota, President and Chief Executive Officer, Blue Cross and Blue Shield Association).

foundation—suggests that constitutional issues did not register with lawmakers and their staff.⁴⁵

Congressional committee reports similarly suggest that lawmakers paid scant attention to the Constitution when enacting the ACA. Not one of the twenty reports issued by the 110th and 111th Congresses formally addresses the constitutionality of the statute.⁴⁶ None of the four Senate Reports make any reference to the Constitution. In the House, institutional rules require “[a] statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by the bill.”⁴⁷ Notwithstanding this requirement, eleven of sixteen House Reports make no reference to the Constitution. Of the five that do reference the Constitution, none does more than merely cite the House Rule and reference constitutional provisions that support enactment without substantive discussion.⁴⁸

Furthermore, committee reports show very little congressional fact-finding overall, and they show no effort to link fact-finding to constitutional standards.⁴⁹ Of the seven reports issued by the 111th Congress, most mention economic research on the need for health care reform. One of the seven discusses the linkage between the costs of the uninsured and the national marketplace. That report, by the Senate Finance Committee, cites “[c]ountless studies” about the economic ramifications of the uninsured—that “23 percent [of uninsured adults] forgo necessary care every year due to cost” and that the cost for those that do seek care is shifted to the insured.⁵⁰

What is striking here is that the ACA is the signature bill of the 111th Congress—a bill that Democrats pushed once taking over Congress in 2007, a bill that builds upon the failed efforts of the Clinton Administration

⁴⁵ Moreover, there is no reason to think this failure was at all calculated as an effort to steer clear of a politically volatile issue. For reasons noted *supra* note 42, majority lawmakers could have pursued this question with little or no political risk.

⁴⁶ Committee reports were identified through two separate searches, a LexisNexis Search and a Lexis/ProQuest Congressional search. Some reports were listed in one search but not the other, and the analysis in this paragraph considers all potentially relevant reports, even if one or the other search did not list a particular report. In other words, if anything, I overstate congressional committee references to the Constitution. For additional discussion from which this paragraph is drawn, see E-mail from Frederick W. Dingley, Reference Librarian, to author (Dec. 12, 2011, 4:55 PM) (on file with the Northwestern University Law Review), and Kelley, *supra* note 35.

⁴⁷ JOHN V. SULLIVAN, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED ELEVENTH CONGRESS, H.R. DOC. NO. 110-162, at 626 (2009) (House Rule XIII, cl. 3(d)(1)).

⁴⁸ All five reference the Commerce Clause, three reference the Necessary and Proper Clause, and two reference Congress’s taxing power under the Sixteenth Amendment.

⁴⁹ Information in this paragraph is drawn from Mann, *supra* note 40.

⁵⁰ S. COMM. ON FIN., AMERICA’S HEALTHY FUTURE ACT OF 2009, S. REP. NO. 111-89, at 2 (2009). In the same report, the Senate Finance Committee references the “hidden health tax,” where health premiums are increased in order to mitigate the “estimated \$56 billion annually in uncompensated care to people without health insurance.” *Id.*

to transform health care in the 1990s, and a bill that “congressional Democrats and President Obama stake[d] their political fortunes on the outcome.”⁵¹ Against this backdrop, the failure of congressional committees to either consider the bill’s constitutionality or to formally engage in fact-finding designed to shore up the bill’s constitutional foundation is stunning. At the same time, this failure is not surprising. The ACA exemplifies the ways that party polarization undermines congressional interest in the Constitution. The confluence of growing committee disinterest in the Constitution and the political necessity of holding the majority coalition together proved to be a perfect storm of the costs and consequences of party polarization.

Congressional debates over the ACA reinforce this conclusion. With no opportunity to use the committee process to attack the ACA’s constitutional foundation, minority lawmakers turned to the floor of Congress to air their grievances. At the same time, declining lawmaker interest in the Constitution meant that policy—not constitutional—concerns were the overwhelming focus of ACA legislative debates. Furthermore, to the extent that minority lawmakers invoke the Constitution, they do so to derail legislative initiatives that they oppose on policy grounds. These very same lawmakers conveniently ignore the Constitution when their party is in the majority.⁵²

These debates over the health care legislation spanned 25 days and totaled 790 pages.⁵³ Twenty-five entries explicitly discussed the constitutionality of the statute.⁵⁴ Sixteen of these entries take up substantially less than one page in the *Congressional Record*. Of the nine entries that take up more than one page, seven contain articles that were submitted to the *Congressional Record*. None of the twenty-five entries discussed congressional fact-finding.⁵⁵

Perhaps more telling, to the extent that lawmakers considered the Constitution at all, they essentially ignored two of the three constitutional issues eventually examined by the Supreme Court in *NFIB*. Lawmakers did not meaningfully discuss either Congress’s efforts to use its Spending Clause power to expand Medicaid or whether the taxing power provided an alternative source of authority for the ACA’s individual mandate. On the question of Congress’s Spending Clause power to expand Medicaid, two

⁵¹ *Landmark Health Care Overhaul*, *supra* note 32.

⁵² See Devins, *supra* note 2, at 746–47 (noting a decline in constitutional hearings irrespective of which party is in the majority); *id.* at 766–67 (noting that, in today’s polarized Congress, constitutional objections to the majority party’s legislative initiatives are made by minority party lawmakers).

⁵³ Information in this paragraph is drawn from Kelley, *supra* note 35; Mann, *supra* note 40.

⁵⁴ Entries refer to headings in the *Congressional Record*. Most entries feature comments by only one member, but some entries feature statements by several members.

⁵⁵ Separate searches for the terms “marketplace,” “unavoidable,” and “voluntary” only turned up a handful of lawmaker comments regarding the idea of a national marketplace for health insurance. See Mann, *supra* note 40.

Republican lawmakers claimed that the Medicaid expansion was unconstitutional, but neither provided any analysis to back up that conclusion.⁵⁶ Likewise, there was next to no discussion of the taxing power as an alternative source of authority for the ACA's individual mandate. Senator Patrick Leahy (D-Vt.) was the only lawmaker to provide any analysis of Congress's taxing power.⁵⁷

Even though lawmakers spent virtually no time examining constitutional issues when debating health care legislation, it is nevertheless true that Republican lawmakers—largely shut out in the committee process—aired their constitutional grievances on the floor of Congress. Six House Republicans and four Senate Republicans questioned the bill's constitutionality in floor debates.⁵⁸ The fact that so few Republican lawmakers spoke to the bill's constitutionality (as compared to the very large number who spoke out against the bill in floor debates⁵⁹) again highlights the currently polarized Congress's disinterest in constitutional issues. Along these lines, it is not surprising that House Republicans scheduled hearings on the constitutionality of the ACA after the 2011 Republican takeover of the House (around nine months after enactment).⁶⁰ In part, Republican leadership in the House had incentive to use constitutional hearings as a mechanism to reinforce claims that theirs is the party of limited government, thereby criticizing the purported overreaching of the White House and congressional Democrats. During the 2010 election cycle, House Republican leadership embraced Tea Party calls for limited government by explicitly questioning the ACA's constitutionality and embracing a proposal requiring every bill to include language citing its constitutional authority. House Majority Leader John Boehner (R-Ohio) specifically attacked the “constitutionally suspect ‘individual mandate’”

⁵⁶ See 156 CONG. REC. H1856 (daily ed. Mar. 21, 2010) (statement of Rep. Deal); 155 CONG. REC. S13,718 (daily ed. Dec. 22, 2009) (statement of Sen. Hutchison).

⁵⁷ See 155 CONG. REC. S13,751 (daily ed. Dec. 22, 2009) (statement of Sen. Leahy). In its Supreme Court brief, the Department of Justice suggested that the taxing power was subject to congressional debate, noting that “congressional leaders defended the provision as an exercise of the taxing power.” Brief for Petitioners (Minimum Coverage Provision) at 58, *Dep’t of Health & Human Servs. v. Florida*, No. 11-398 (U.S. Jan. 6, 2010), 2012 WL 37168, at *58. With the exception of Senator Leahy, however, no member did more than mention the taxing power without meaningful elaboration. See Memorandum from Amber Shepherd, Research Assistant, to author (July 2, 2012) (on file with the Northwestern University Law Review).

⁵⁸ See 156 CONG. REC. H177–83 (daily ed. Jan. 19, 2010) (statements of Reps. Garrett, Foxx, Broun, Gohmert, and Bishop); 155 CONG. REC. S13,821–29 (daily ed. Dec. 23, 2009) (statements of Sens. Hutchison, Ensign, Hatch, and Kyl); 155 CONG. REC. H12,429 (daily ed. Nov. 5, 2009) (statement of Rep. Poe).

⁵⁹ As noted earlier, legislative debates of the ACA took up 790 pages in the *Congressional Record*, nearly all of which focused on policy—not constitutional—issues.

⁶⁰ The 2011 hearings about the constitutionality of the ACA were also tied to 2010 federal district court rulings that the ACA was unconstitutional. See *infra* notes 94–96 (discussing the role of these federal court rulings in the 2011 Senate Judiciary Committee hearings on the ACA's constitutionality).

and, relatedly, argued that a requirement that all bills cite specific constitutional authority could create a valuable “obstacle to expanded government.”⁶¹ Following the 2010 elections, House Republican leadership likewise made clear that it intended to continue its campaign to dismantle health care reform.

Two additional points bear mention in discussing the potential nexus between Congress’s failure to consider the ACA’s constitutionality and the Court’s role in placing limits on congressional power (as *NFIB* placed limits on the commerce and spending but not the tax power). First, for reasons I will detail in Part III, Congress’s interest in constitutional questions should be salient to the scope of judicial review on federalism issues. This does not mean that the Court was right to place the limits it did on Congress’s commerce and spending powers; it means that the Court should take Congress’s predilections into account.⁶² Second, even if congressional disinterest in the Constitution prompted the Court to reign in Congress, the Court should not invalidate legislation because Congress fails to hold constitutional hearings, fails to engage in constitutional fact-finding, or fails to meaningfully debate the constitutionality of legislation. There is no such thing as “due process in lawmaking,” obligating Congress to hold hearings or anything else. Indeed, legislative action leading up to the ACA—as well as findings in the ACA itself—highlight the impossibility of imposing due process demands on Congress.⁶³ Most notably, the bill contains eight specific findings to support claims that the ACA’s individual mandate is “commercial and economic” and “substantially affects interstate commerce.”⁶⁴

⁶¹ See *House Republicans Want All Bills to Cite Constitutional Authority*, FOXNEWS.COM (Sept. 17, 2010), <http://www.foxnews.com/politics/2010/09/17/house-republicans-want-bills-cite-constitutional-authority/> (internal quotation mark omitted). The rise of the Tea Party as a politically powerful Republican constituency propelled these constitutional arguments and initiatives. See Zietlow, *supra* note 2, at 1395–1401.

⁶² See *infra* notes 104–07 and accompanying text.

⁶³ See also Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 400–06 (arguing that there is no “due process in lawmaking”).

⁶⁴ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(2), 124 Stat. 119 (2010) (to be codified at 42 U.S.C. § 18091). In its briefs defending the ACA, the Department of Justice points to these legislative findings—as well as roughly eighteen references to the national health marketplace in hearings, debates, and reports during the 110th and 111th Congresses—to assert that “the legislative record leave[s] no doubt that [the ACA’s individual mandate] . . . is a valid exercise of the commerce power.” Brief for Appellants at 25, *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-11021 & 11-11067), 2011 WL 1461593, at *25. Department of Justice lawyers deserve great credit for culling the legislative record to make as convincing a case for the ACA as possible. At the same time, the Government’s brief (which intersperses academic studies along with legislative record material) is ultimately a “legislative collage” as opposed to legislative history. Its collection of legislative findings, debate statements, committee hearings, legislative memos, and academic studies makes the best case possible for the ACA but does not counter, for reasons detailed in

II. BEYOND POLARIZATION: OTHER EXPLANATIONS FOR CONGRESS'S FAILURE TO THINK ABOUT THE CONSTITUTION WHEN ENACTING THE ACA

In Part I, I explained how party polarization contributes to a general decline in lawmaker interest in constitutional questions and, correspondingly, that Congress's enactment of the ACA exemplifies this larger trend. In this Part, I will consider three other factors that may have contributed to congressional disinterest in the ACA's constitutionality: Congress's general disinterest in public goods like constitutional interpretation; the absence of a federalism constituency in Congress (so that there is no interest group pressure pushing lawmakers to consider the federalism implications of legislation); and the fact that constitutional objections to the ACA were made late in the legislative process and, as such, lawmakers did not have time to seriously consider potential constitutional objections to the ACA. For reasons I will detail in this Part, I think the public goods and federalism constituency explanations are useful supplements to my claims about party polarization; I do not, however, think that timing concerns made it impossible for Congress to think about the constitutionality of the ACA.

A. Congress and the Constitution

Lawmakers have little incentive to independently interpret the Constitution. In particular, while all members of Congress have a stake in preserving Congress's institutional authority to independently interpret the Constitution, lawmaker desires to seek reelection, gain status within their party, and serve interest group constituents overwhelm this "collective good."⁶⁵ In particular, a lawmaker who invests in constitutional interpretation "loses time for fundraising, casework, media appearances, and obtaining particularized spending projects in her district; she will thus be at a disadvantage [when seeking reelection]."⁶⁶

In explaining why "Congress is designed to pass over constitutional questions," former Congressman and D.C. Circuit Judge Abner Mikva remarked that "the constitutional principles involved in a bill, unlike its merits, are generally abstract, unpopular, and fail to capture the imagination of either the media or the public. The Constitution is often portrayed as an obstacle to a better society by Congressmen forced to confront its limitations."⁶⁷

this Part, the overwhelming evidence that lawmakers were not meaningfully engaged in constitutional analysis or constitutional fact-finding.

⁶⁵ Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 144 (1999).

⁶⁶ Garrett & Vermeule, *supra* note 8, at 1301.

⁶⁷ Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609–10 (1983).

Academic studies of lawmaker interest in constitutional interpretation bear this out. Consider, for example, the complementary work of Mitch Pickerell, Keith Whittington, and Bruce Peabody. Pickerell's study of constitutional deliberation in Congress demonstrates that lawmakers typically advance a positive legislative agenda and, consequently, rarely have reason to discuss potential constitutional limitations; instead, lawmakers "first take their position on legislation based on their policy preferences, and then use all arguments possible to support that position."⁶⁸ Whittington likewise calls attention to how it is that lawmakers benefit by making judgmental statements pleasing to voters and other constituents.⁶⁹ In particular, lawmakers "can always take credit for voting the right way on the issue" and, as such, are unlikely to raise constitutional or other objections that cut against such "position-taking" behavior.⁷⁰ Peabody's study (surveying lawmakers' attitudes towards Court–Congress relations) highlights two related phenomena, namely, (1) the legal issues that matter to lawmakers concern "local and electorally salient matters" and (2) more than 70% of lawmaker respondents said the courts should give little or no weight to congressional judgments about the constitutionality of legislation.⁷¹ In other words, lawmakers care about reelection; they do not defend their institutional prerogatives to interpret the Constitution but, instead, defer to the courts.⁷²

Party polarization, for the reasons discussed in Part I, exacerbates Congress's general disinclination to engage in constitutional issues. Majority party leaders do not want to allow the opposition party to raise constitutional objections to their proposals; committee chairs have fewer staff to pursue such issues and less interest in reaching across the aisle to build bipartisan coalitions with the minority party. Correspondingly, with party members adhering to leadership-defined priorities, there is no reason to accommodate dissenters within the majority party.

Congress's failure to consider the constitutionality of the ACA, undoubtedly, is tied to both polarization and to the fact that constitutional interpretation is the type of collective good that lawmakers discount in the pursuit of their preferred policies and reelection. For reasons I will now detail, the absence of a federalism constituency in Congress also

⁶⁸ PICKERELL, *supra* note 23, at 143–44.

⁶⁹ Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001).

⁷⁰ *Id.* at 513. Whittington cites the Violence Against Women Act and the Gun Free School Zone Act as examples of "position-taking" behavior. *See id.*

⁷¹ Peabody, *supra* note 26, at 147, 151.

⁷² *See* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–65 (1999) (arguing that legislators—knowing that courts will check their errors—have little incentive to enact only constitutionally permissible statutes); Neal Devins, *Congress as Culprit: How Lawmakers Spurred On the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 440–47 (2001) (highlighting various ways that Congress signals to the Supreme Court that it embraces judicial supremacy).

contributed to Congress's failure to consider the constitutionality of the ACA.

B. Federalism and the Failure of Interest Group Politics

There is no federalism constituency in Congress. Interest groups and voters are interested in first-order policy preferences; the question of whether favored policies are pursued by Congress or the states matters little to voters and interest groups. Indeed, interest groups have incentive to pursue nationwide initiatives. Rather than seek reform in fifty different states, national solutions cement interest group preferences in ways that are more pervasive and more efficient (national solutions cost less money and take less time to pursue than state by state reforms).⁷³ Moreover, state and local interests often benefit from national programs, and consequently, states and localities do not serve as a bulwark protecting state prerogatives from Congress's nationalistic tendencies.⁷⁴

In previous writings, I have looked at judicial confirmation hearings, party platforms, interest group web pages, opinion polls, and lawmaker commentary on Supreme Court federalism decisions to detail how uninterested today's Congress and interest groups are in federalism qua federalism.⁷⁵ This disinterest tracks historical patterns. In particular, rather than adhere to a consistent position on federalism, Americans have always let their views on first-order policy priorities dictate their views on federalism. Here are a few examples: When fighting over the Louisiana Purchase, Northern Federalists, who typically advocated for federal power, and Jeffersonians, who usually supported states' rights, flipped their normal positions to pursue favored policies. During the Civil War, abolitionists (who had earlier opposed fugitive slave laws on states' rights grounds) embraced nationalistic solutions and proslavery forces embraced states' rights arguments. Similarly, before workers could turn to the federal government during the New Deal, turn-of-the-century progressives "stroved to curb the power of entrenched corporate wealth."⁷⁶ More recently, Republicans who ran on the anti-big-government "Contract with America" pursued national standards on tort reform, telecommunications reform, and numerous criminal law initiatives.

⁷³ See William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139 (1998).

⁷⁴ See McGinnis & Somin, *supra* note 8.

⁷⁵ See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1194–1200 (2001); Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making but Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307, 1318–24 (2002); Devins, *supra* note 8. Examples for the balance of this paragraph are drawn from *id.* at 134–37.

⁷⁶ Eugene D. Genovese, *Getting States' Rights Right*, ATLANTIC (March 2001), <http://www.theatlantic.com/magazine/archive/2001/03/getting-states-rights-right/302133/>.

In addition to the flipping of positions by interest groups and elected officials, it is sometimes the case that elected officials simply ignore federalism concerns—as no interest group is pushing Congress to take federalism into account when enacting legislation. Consider, for example, the Partial Birth Abortion Ban Act (PBABA).⁷⁷ To start, pro-choice and pro-life interests sometimes support and other times oppose laws that seek national solutions to abortion-related issues. For example, pro-choice and pro-life interests divide over the PBABA and freedom of choice legislation. That division has nothing to do with federalism, as both measures are propelled by an expansive view of congressional power. With no obvious benefit to be derived from embracing a broad or narrow view of congressional power, pro-choice and pro-life interest groups see federalism as a second-order issue that is of next to no relevance to them. That is why lawmakers largely ignored federalism concerns when enacting the PBABA in 2003—even though lawmakers were on notice that Congress might not have authority under the Commerce Clause to regulate which medical procedures women can use to terminate late-term pregnancies.⁷⁸ Instead, pro-choice and pro-life lawmakers and interest groups appealed to their base by engaging in the moral and legal debate about the right to choose, not the mundane issue of whether the PBABA was an “economic” regulation.

The ACA seems cut from a similar cloth. No federalism constituency pushed for federalism-related hearings, and legislative debates focused almost exclusively on policy, not constitutional, questions.⁷⁹ No lawmaker discussed congressional fact-finding when discussing the Act’s constitutionality; Republican lawmakers’ attacks against the bill focused almost exclusively on policy concerns, suggesting that these lawmakers saw little political gain in arguing that the bill was constitutionally flawed.⁸⁰ And while party polarization helps explain the absence of congressional hearings to assess the constitutionality of the ACA, the absence of a federalism constituency also explains this failure. Likewise, the failure of minority party lawmakers to use legislative debates to launch a constitutional attack

⁷⁷ This paragraph is drawn from Neal Devins, *How Congress Paved the Way for the Rehnquist Court’s Federalism Revival: Lessons from the Federal Partial Birth Abortion Ban*, 21 ST. JOHN’S J. LEGAL COMMENT. 461, 465–68 (2007).

⁷⁸ Specifically, the federalism issue had been raised in 1995 hearings, in law review articles, and in opinion pieces published by the *Washington Post* and the *National Review*. Nevertheless, with the exception of Senator Diane Feinstein (D-Cal.) and Representative Ron Paul (R-Tex.), lawmakers did not consider the law’s federalism implications when enacting it. *See id.* at 466. The House Committee Report does include a brief discussion of Congress’s Commerce Clause authority, although dissenting Democrats made no mention of the Commerce Clause in their “dissenting views.” *See* H.R. REP. NO. 108-58, at 23–26 (2003). Moreover, with the exception of one passing reference to the federalism issue, committee hearings ignore the Commerce Clause issue. *See* Devins, *supra* note 77, at 466–67.

⁷⁹ *See supra* notes 52–58 and accompanying text.

⁸⁰ *See supra* notes 58–59.

on the bill seems a function of both congressional disinterest in the Constitution and the absence of a federalism constituency.

C. Did Congress Have Reason to Think that the Individual Mandate Might Be Unconstitutional?

Congress's disinclination to assess the underlying constitutionality of federalism-related legislation is certainly linked to party polarization, the lack of a federalism constituency, and Congress's general disinterest in public goods like constitutional interpretation. At the same time, lawmakers are not seers and they should not be expected to anticipate arguments that do not exist when legislation is crafted. For this very reason, Andrew Koppelman argues that Congress did not consider constitutional attacks to the ACA because bill opponents failed to raise serious Commerce Clause objections in time for lawmakers to take those objections into account.⁸¹ Claiming that these objections to the bill were not fully developed until the fall of 2009, "quite late in the legislative process," the "constitutional limits that the bill supposedly disregarded could not have been anticipated because they did not exist while the bill was being written."⁸²

This claim is not frivolous. Commerce Clause objections to the bill were not meaningfully launched until July 2009, and these objections were not fully developed until late fall 2009 (around the time that Congress was completing hearings on the ACA).⁸³ At the same time, Congress was certainly "on notice" in the summer of 2009 that the individual mandate would be subject to a vigorous constitutional attack. Moreover, Congress's failure to engage in constitutional fact-finding was a byproduct of legislative disinterest, not the failure of Act opponents to launch timely complaints about the ACA.⁸⁴ Indeed, for reasons I will now detail, Congress's failure was not tied to notice; it was tied, instead, to issue

⁸¹ Koppelman, *supra* note 5.

⁸² *Id.* It is unclear whether Congress was on notice with respect to Spending Clause objections. This was essentially a nonissue in the press and among academic commentators; moreover, as noted above, only two lawmakers made any reference to it in legislative debates. *See supra* note 55. Moreover, the Supreme Court had never ruled that an exercise of the Spending Clause was unconstitutional because it was unduly coercive. *See* Aziz Huq, *In the Healthcare Decision, a Hidden Threat?*, NATION (June 29, 2012), <http://www.thenation.com/article/168677/healthcare-decision-hidden-threat#> (suggesting that Spending Clause ruling was unprecedented and unexpected). At the same time, the Court had put Congress on notice that "in some circumstances the financial inducement offered by Congress might be so coercive as to . . . [be] unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *see also supra* notes 39, 56 (noting no congressional fact-finding on the coercion issue); *infra* note 101 (discussing Court's Spending Clause ruling).

⁸³ *See* Koppelman, *supra* note 5 (contending that "[t]he first sustained legal argument" against the ACA was published in December 2009).

⁸⁴ This applies to the Spending Clause as well as the Commerce Clause. For example, Congress made no effort to find facts that the Medicaid condition was noncoercive. *See supra* notes 39, 42, 56; *see also supra* note 41 (noting that Commerce Clause fact-finding could be pursued at no political cost to Democrats).

salience. Specifically, it took the launching of constitutional challenges to the ACA by more than twenty Republican governors and attorneys general and the invalidation of the statute by two federal district courts to create the type of issue salience that compelled Congress to hold constitutional hearings on the statute.⁸⁵ Before that time, the roadblocks to constitutional deliberation were sufficiently potent to prevent lawmakers from meaningfully considering possible constitutional challenges to the statute.

To start, congressional Democrats were strongly disinclined to hold hearings about the ACA's constitutionality. In addition to the above-discussed roadblocks, Democratic leaders could not risk their very fragile coalition by allowing bill opponents to use constitutional hearings as a vehicle to slow down momentum for the bill.⁸⁶ Moreover, by the summer of 2009 (several months before the last hearings on the ACA), congressional Democrats were on notice that bill opponents would oppose the bill on constitutional grounds. From July to September 2009, opinion pieces in the *Washington Post* and *Wall Street Journal* and an online debate in *Politico* all flagged potential constitutional problems with the ACA.⁸⁷ These opinion pieces, among other things, argued that "[t]he federal government does not have the power to regulate Americans simply because they are there"⁸⁸ and that "Congress would have to explain how not doing something . . . implicated interstate commerce."⁸⁹ By the fall of 2009, congressional Democrats were well aware that the bill would be subject to a fierce constitutional attack both in the courts and on the campaign trail,

⁸⁵ See Klein, *supra* note 6 (noting these and other factors); see also Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012, 2:55 PM), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> (highlighting the import of unified Republican opposition to the bill, including the litigation challenge by Republican attorneys general).

⁸⁶ See *supra* notes 31–33 and accompanying text (discussing steps that Speaker Pelosi and Majority Leader Reid took to keep the Democratic coalition intact); see also Chris Frates, *Ben Nelson's Medicaid Deal*, POLITICO (Dec. 19, 2009, 9:53 AM), http://www.politico.com/livepulse/1209/Ben_Nelsons_Medicaid_deal.html (noting that Democratic leaders—in order to keep Nebraska Senator Ben Nelson as part of their coalition—modified the bill so that the federal government would pay for Nebraska's Medicaid costs under the ACA).

⁸⁷ See JENNIFER STAMAN & CYNTHIA BROUGH, CONG. RESEARCH SERV., *REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS* (2009) [hereinafter CRS REPORT]; David B. Rivkin Jr. & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, at A15; *Healthcare: Is "Mandatory Insurance" Unconstitutional?*, POLITICO (Sept. 18, 2009), <http://www.politico.com/arena/archive/healthcare-reform-constitutionality.html>; Andrew P. Napolitano, *Health-Care Reform and the Constitution*, WALL ST. J. (Sept. 15, 2009, 8:57 AM), <http://online.wsj.com/article/SB10001424052970203917304574412793406386548.html>.

⁸⁸ Rivkin & Casey, *supra* note 87.

⁸⁹ Koppelman, *supra* note 5 (quoting a July 10, 2009 Federalist Society paper by Peter Urbanowicz and Dennis G. Smith).

where Republicans (buoyed by Tea Party opposition to the ACA) would trash the bill as unconstitutional governmental overreaching.⁹⁰

Against this background, congressional Democrats should have known of potential constitutional challenges to the Act, including the action-inaction distinction that proved central to the Commerce Clause ruling in *NFIB*.⁹¹ At the same time, these constitutional arguments—while politically strong—were not sufficiently salient to compel an otherwise reluctant Congress to hold constitutional hearings or meaningfully debate the Act's constitutionality. Instead, reflecting Congress's general disinterest in constitutional questions, Democratic lawmakers made no efforts to use existing hearings to find facts that would strengthen the Act's constitutional foundations.⁹² Lawmakers, moreover, made no formal reference in the ACA to the Commerce Clause, the Necessary and Proper Clause, the Spending Clause, or Congress's taxing power. Even more striking, Republican lawmakers launched only a half-hearted attempt to cast doubt on the ACA's constitutionality; they focused, instead, on the policy issues that seemed politically salient at the time.⁹³

By February 2011 (almost one year after enactment of the ACA), the bill's constitutionality was sufficiently salient to prompt House and Senate hearings on the ACA's constitutionality.⁹⁴ By this time, there was great

⁹⁰ For a discussion of Tea Party opposition to the bill, see John Fritze et al., *The Health Care Bill's 8 Key Moments*, USA TODAY (Mar. 25, 2010, 11:28 PM), http://www.usatoday.com/news/washington/2010-03-25-health-care-moments_N.htm. For a discussion of Tea Party efforts to link their opposition to the ACA and other governmental programs with their vision of constitutional federalism, see Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300 (2011); Zietlow, *supra* note 2, at 1367–68, 1395–97; Jill Lepore, *The Commandments: The Constitution and Its Worshipers*, NEW YORKER (Jan. 17, 2011), http://www.newyorker.com/arts/critics/atlarge/2011/01/17/110117crat_atlarge_lepore; and Adam J. White, *The Tea Party's Constitution*, WKLY. STANDARD (Aug. 29, 2011), http://www.weeklystandard.com/articles/tea-party-s-constitution_590449.html.

⁹¹ Some have argued that congressional Democrats should have known about this argument before proposing the individual mandate. Specifically, when the Clinton White House proposed a requirement that all businesses provide health insurance, the *Wall Street Journal* published an op-ed by David Rivkin and Lee Casey arguing that such a mandate impermissibly forced people who were doing nothing to act. See James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, June 14, 2012, at A1 (late edition). At the same time, I do not think Congress should be expected to know about arguments that were made sixteen years earlier.

⁹² See *supra* notes 39–45 and accompanying text.

⁹³ See *supra* notes 58–59.

⁹⁴ In addition to the two hearings explicitly about the constitutionality of the ACA, there were mentions of the ACA's constitutionality in twenty other hearings from March 26, 2010, to December 31, 2011. This number was based on a search of the LEXIS CQ Transcription database and the Federal News Service database. See Dingley, *supra* note 46. During this same period, a search of the *Congressional Record* resulted in 220 hits. The search was: “(affordable care act and (constitution! Or unconstitution!) and section (house or senate and not digest)).” For additional discussion of the specific questions asked in hearings and statements made on the floor of Congress, see Memorandum from Brian Kelley, Research Assistant, to author (Aug. 18, 2011) (on file with the Northwestern University Law Review). Finally, Democratic leadership (in both the House and Senate, including leaders of committees

interest in Congress and throughout the country in the constitutionality of the Act—thanks to the confluence of federal court rulings against the ACA, the Tea Party fueled Republican takeover of the House, the efforts of Republican party officials to challenge the ACA in court, and the media attention attendant to all these developments.⁹⁵ Furthermore, since the ACA was law, there was little reason (in the still-Democratic controlled Senate) for party leaders to resist such hearings.⁹⁶

* * *

Congress's failure to think about the Constitution when enacting the ACA is hardly surprising. For reasons detailed in the first two Parts of this Essay, this failure is a byproduct of party polarization, the absence of a federalism constituency in Congress, and Congress's disinclination to pursue collective goods like constitutional interpretation. Indeed, even though Congress was on notice of potential constitutional challenges to the ACA, the constitutional issue was of little salience to either Democratic or Republican lawmakers at the time of the ACA's enactment (as revealed in the failure of legislative debates to seriously consider the constitutional question). Instead, it was outside-the-D.C.-beltway forces that transformed the ACA's constitutionality into a politically salient issue, namely, the efforts of Republican governors and attorneys general who challenged the ACA, the Tea Party and its contribution to the 2010 Republican takeover of the House, and the two federal district courts that found the ACA unconstitutional.

III. CONCLUSION: THE JUDICIAL SAFEGUARDS OF FEDERALISM⁹⁷

The question remains: What does my case study of the ACA suggest about the Court's role in reviewing congressional decisionmaking on federalism issues? In this concluding Part, I will address this issue—suggesting that the judiciary is the only branch of government that will police federalism. And while I personally disagree with the five Justices who thought that the Commerce Clause did not back up the ACA, I do think it is the Supreme Court's responsibility to impose some boundary-control

of relevant jurisdiction) and more than one hundred Republicans joined one or more of several amicus briefs on the constitutionality of the ACA before the federal courts of appeal. *See id.*

⁹⁵ *See* Balkin, *supra* note 85; Klein, *supra* note 6.

⁹⁶ There is good reason to think that House and Senate Judiciary Committee members wanted to hold hearings on the ACA's constitutionality, for these committees are dominated by policy-oriented lawyers personally interested in constitutional questions. Devins, *supra* note 2, at 778–79. On the House side, the Republican takeover of the House also fueled such hearings (so that the Republican party could beat its drum regarding the constitutionality of the ACA). *See supra* notes 60–61.

⁹⁷ The title of this Part is drawn from Devins, *supra* note 8. The second paragraph of this Part is drawn from *id.* at 136–37.

limits on Congress. Indeed, against the backdrop of congressional inattention to the Constitution, including constitutional fact-finding, it is hard to find fault with the five Justices who wanted to slap Congress (even if another form of boundary control might have been preferable).⁹⁸

Congress, as suggested in Part II, cannot police itself on federalism-related issues. Voters, interest groups, and political parties look to democratic outlets to pursue favored policy initiatives. And since the first-order policy priorities of interest groups are sometimes served by judicial standards that facilitate Congress's expansionist tendencies, there is no interest group that will push for a narrowing construction of Congress's commerce power.⁹⁹ In other words, unless judicial interpretations foreclose the pursuit of first-order policy priorities, it is unlikely that lawmakers will formally and consistently embrace a broad theory of federalism.

How then should the Court police Congress's exercise of its commerce power? One approach is to rely on fact-dependent standards; another is to place limits on Congress through boundary-control rules that would deem some federalism-related issues to be questions of law, not fact.¹⁰⁰ For reasons I have detailed elsewhere, I think fact-dependent standards do not operate as meaningful constraints on Congress's commerce power. With no federalism constituency in Congress, there is little reason to think that Congress will take fact-finding seriously, and courts are ill equipped to second-guess Congress's findings.¹⁰¹

In *NFIB*, five of the Justices made use of a boundary-control rule to limit Congress's commerce power.¹⁰² Concluding that the mandate "directs

⁹⁸ For additional discussion, see *infra* notes 105–06.

⁹⁹ See McGinnis & Somin, *supra* note 8; Whittington, *supra* note 69, at 509–18.

¹⁰⁰ An example of a fact-dependent standard is the "affecting commerce" standard that the Court deployed in the 1937 decision, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 6 (1937). An example of a boundary-control rule is the requirement that Congress's commerce power is limited to economic activity, that is, "the instrumentalities, channels, or goods involved in interstate commerce." *United States v. Morrison*, 529 U.S. 598, 618 (2000).

¹⁰¹ See Devins, *supra* note 75, at 1198–1200. It is less certain whether Congress could insulate factual assertions about whether conditions on federal spending are coercive. For the Commerce Clause, questions about whether activities, for example, do "affect interstate commerce" seem nationwide in scope and, as such, best answered by the national legislature. On the other hand, questions about coercion are arguably best answered by the states subject to the choice of whether to accept or forego conditions on federal funds.

¹⁰² See James B. Stewart, *An Important New Limit on the Commerce Clause*, N.Y. TIMES (June 28, 2012, 2:16 PM), <http://thecaucus.blogs.nytimes.com/2012/06/28/an-important-new-limit-on-the-commerce-clause/>. For a variety of reasons, there is some question as to whether the opinions of these five Justices constitute a binding precedent on Congress's commerce power. See Walter Dellinger, *Supreme Court Year in Review—Entry 15: Why This Is Now Chief Justice Roberts' Court*, SLATE (June 28, 2012, 1:13 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_upholds_obamacare_why_this_is_now_roberts_court.html (noting that there was no opinion in which five Justices joined); William A. Jacobson, *What If That Huge Conservative Doctrinal Achievement Was Mere Dicta?*, LEGAL INSURRECTION (June 29, 2012, 4:36 PM), <http://legalinsurrection.com/2012/06/what-if-that-huge-conservative-doctrinal->

the creation of commerce” and that “[c]onstruing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority,”¹⁰³ these Justices embraced the action–inaction distinction advanced by critics of the law. Through this boundary control, Congress could regulate but not create commerce.

That the Court would want to create some type of boundary control in the ACA case seems sensible. Congress made no effort to find facts showing that the uninsured participate in the national health marketplace.¹⁰⁴ Likewise, there are no findings that the individual mandate is “necessary and proper” to a well-functioning national health insurance system.¹⁰⁵ Finally, the bill does not even reference the Necessary and Proper Clause or Congress’s powers over commerce, spending, and taxation.¹⁰⁶ Given the import of the bill, the uniqueness of the mandate, and the fact that Congress had reason to know that the bill would be subject to a serious constitutional challenge, Congress’s failure to think about the Constitution seems especially egregious.

None of this is to say that the Court needed to draw a boundary in the ACA case or that the boundary it drew was correct.¹⁰⁷ At the same time,

achievement-was-mere-dicta/ (noting that the Commerce Clause holding was not essential to Chief Justice Roberts’s opinion).

¹⁰³ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2644 (2012) (Scalia, J., dissenting); *id.* at 2587 (majority opinion).

¹⁰⁴ See sources cited *supra* note 44.

¹⁰⁵ This type of finding would correspond to Justice Scalia’s invocation of the Necessary and Proper Clause in a 2005 ruling upholding a federal ban on medical marijuana in *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring). For a discussion of the link between Justice Scalia’s *Raich* concurrence and the ACA, see CRS REPORT, *supra* note 87, at 8 & n.41.

¹⁰⁶ Congress, as Chief Justice Roberts noted in his opinion, is under no formal obligation to cite these powers. See *supra* note 28. At the same time, it cannot help a bill’s chances when its defenders—academic amici and the Department of Justice—must invest substantial effort in explaining why, for example, “[t]he Taxation Clause does not require Congress to use any particular labels or expressly invoke the taxation power.” Brief of Constitutional Law Professors as Amici Curiae in Support of Defendant-Appellant at 16, U.S. Dep’t of Health & Human Servs. v. Florida, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part by NFIB*, 132 S. Ct. 2566 (Nos. 11-11021), 2011 WL 1461597, at *16.

¹⁰⁷ I think both that the uninsured participate in the national health marketplace and that it is “necessary and proper” to impose costs on the uninsured as part of a national regulatory insurance scheme that requires insurance companies to provide coverage to individuals with preexisting conditions. From my vantage, the constitutional objection to the individual mandate is much more about the liberty interest “not to participate” than about the Commerce Clause. For this very reason, I signed a brief supporting the individual mandate as an exercise of Congress’s commerce power. See Brief of Law Professors Barry Friedman, Matthew Adler, et al., as Amici Curiae in Support of Petitioners and Reversal on the Minimum-Coverage Provision Issue, U.S. Dep’t of Health & Human Servs. v. Florida, No. 11-398 (U.S. Jan. 13, 2012), 2012 WL 160237. Moreover, the Court could have imposed a somewhat different boundary on the Commerce Clause—allowing Congress to create incentives to participate in one or another market but rejecting the idea that Congress could compel mandatory participation. This suggestion was advanced by Walter Dellinger as a way for the Court to place limits on Congress while upholding the mandate under the commerce power. See Walter Dellinger, *Supreme*

Congress's failures are striking and the Court's efforts to limit Congress understandable. Sadly, for reasons detailed in Parts I and II of this Essay, there is little reason to think that Congress will change its practices. Lawmaker disinterest in the pursuit of common goods like constitutional interpretation and the absence of a federalism constituency will remain substantial roadblocks to constitutional review by Congress. Moreover, party polarization exacerbates these roadblocks; today's Congress is far less interested in the Constitution than earlier Congresses. The ACA is a product of its times, and judicial limits on congressional power seem sensible in this context.

Court Year in Review—Entry 1: Could the Court's Conservatives Split the Difference on Obamacare?, SLATE (June 22, 2012, 11:28 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_awaiting_a_decision_on_obamacare_.html.